



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Civil Appli. Nai 297 of 2006 (167/2006 UR)

DAVID G. KATIBA APPLICANT

AND

KENYA COMMERCIAL BANK LTD.RESPONDENT

(An application for an injunction in an intended appeal from a Ruling & Order of the High Court of Kenya at Nairobi (Ochieng, J) dated 13th October, 2006

In

H.C.C.C. No. 295 of 2006)

RULING OF THE COURT

By his notice of motion dated 20th November, 2006 and lodged in this Court on 24th November, 2006 and which is brought pursuant to **Rule 5 (2) (b)** of the Court of Appeal Rules, David G. Katiba, the applicant herein, asks the Court for an order that:-

“Pending the hearing and determination of the appeal herein an order of injunction do issue to restrain the defendants whether by themselves or through their agents from selling or transferring the appellant’s property being LR NO. LOC 10 Wanjengi/121 being the property, the subject of the Appeal herein and the pending main case in the High Court being Milimani H.C.C.C. No. 295 of 2006.”

The “*defendants*” who are to be restrained from selling or transferring the applicant’s named land are “Kenya Commercial Bank Ltd. , the respondent to the applicant’s notice of motion. The superior court was asked for a similar order of injunction but by his Ruling dated and delivered on 13th October, 2006, Ochieng , J dismissed the applicant’s application for the injunction sought. The applicant filed a notice of appeal to challenge the learned Judge’s refusal to restrain the respondent from selling or disposing of the applicant’s land. It appears from the record before us that an appeal has actually been lodged. Pending the hearing and determination of the pending appeal, the applicant seeks from us an order of injunction and since the application is brought under **Rule 5 (2) (b)**, the applicant was obliged to satisfy us on two issues before he can get the order of injunction. Those two issues are well known, namely:-

- (i) that the applicant has an arguable appeal, i.e. an appeal which is not frivolous;

and

(ii) that if we refuse to grant an injunction and the applicant's appeal were to eventually succeed, that success would have been rendered nugatory by the refusal to grant the injunction.

The applicant has to satisfy the Court not on one but on both of the requirements.

As far as we understand the matter, the respondent wants to sell the applicant's land LR NO. LOC 10/Wanjengi/121 in the exercise of its statutory power of sale. The applicant contends and has always contended that the respondent is not entitled to exercise that power, i.e. that no occasion has arisen to warrant the exercise of that power. So, to prevent the exercise of the power, the applicant first filed Civil Case No. 183 of 2000 in the court of the Senior Principal Magistrate at Muranga. That case was, according to the applicant, withdrawn.

Next the applicant filed in the High Court at Milimani, H.C.C.C. No. 635 of 2003. There was an application for injunction in that case. Mutungi, J heard the application for injunction and concluded that:-

“There is no doubt in my mind that the applicant has no legal basis to oppose the Bank's statutory sale of the charged property. But he prays for a little time to comply.”

It appears that Mutungi, J directed the applicant to pay Kshs.410,000/- and thereafter he was “to *then arrange the payment of the balance.*” There was no appeal from any of the orders made by Mutungi, J. According to what we can gather from the Ruling of Ochieng, J, one year after the Ruling of Mutungi, the applicant filed another application for injunction apparently in H.C.C.C. No. 635 of 2003. This second application was heard by Azangalala, J and that Judge concluded that :-

“The ruling of Mutungi, J was not ambiguous. It dealt with the first application. If the plaintiff was not happy with it or if he felt circumstances required a variation of the same he should have, in my view, sought a review of the said order. in the result, I am constrained to hold that the present application does not lie as it is res judicata.”

Once again, there was no appeal from the order made by Azangalala, J. But still undeterred, the applicant then filed H.C.C.C. No. 295 of 2006. He again sought the same order for an injunction. That is the application heard and ruled on by Ochieng, J. Having set out the history of the matter, Ochieng, J concluded that:-

“..... To my mind, justice demands that I too should tell the plaintiff he cannot be given a new hearing on the basis of material which he could have used when canvassing the application dated 7th October, 2003.

For all these reasons, I find that the plaintiff has failed to establish a prima facie case with a probability of success.”

This is the order the applicant is challenging in his appeal. Like Ochieng, J, taking into account all the surrounding circumstances of the case including its history, we are unable to conclude that the applicant's appeal is arguable. We are aware of the fact that an arguable appeal is not one which will or must succeed. But taking everything into account at this stage, the applicant has not satisfied us that his appeal is arguable. That being the stand we take on the matter, we need not consider the second requirement regarding the appeal being rendered nugatory. That consideration only arises where the Court is satisfied that there is an arguable appeal. Despite the spirited efforts of Mr. Namada on behalf of the applicant, we must order, as we hereby do, that the applicant's notice of motion in this Court be and is hereby dismissed with the costs thereof to the respondent. Those shall be the orders of the Court.

Dated & delivered at Nairobi this 13th day of July, 2007.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

W.S. DEVERELL

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.